

PART 401—MULTIFAMILY HOUSING MORTGAGE AND HOUSING ASSISTANCE RESTRUCTURING PROGRAM (MARK-TO-MARKET)

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§ 401.1

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401.652 No judicial review.

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Subpart A—General Provisions; Eligibility

§ 401.1 What is the purpose of part 401?

This part contains the regulations implementing the authority in the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA) for the Mark-to-Market Program including the renewal of project-based assistance contracts for eligible projects without restructuring. Section 511(b) of MAHRA details the purposes, and section 512(2) details the scope, of the Program.

§ 401.2 What special definitions apply to this part?

(a) *MAHRA* means the Multifamily Assisted Housing Reform and Affordability Act of 1997, title V of Pub. L. 105-65, 42 U.S.C. 1437f note.

(b) *Statutory terms.* Terms defined in section 512 of MAHRA are used in this part in accordance with their statutory meaning. These terms are: comparable properties, expiring contract, expiration date, fair market rent, mortgage restructuring and rental assistance sufficiency plan, nonprofit organization, qualified mortgagee, portfolio restructuring agreement, participating administrative entity, project-based assistance, renewal, State, tenant-based assistance, and unit of general local government.

(c) *Other terms.* As used in this part, the term—

Affiliate means an affiliate of the owner or an affiliate of the purchaser, as such terms are defined in section 516(a) of MAHRA.

Applicable Federal rate has the meaning given in section 1274(d) of the Internal Revenue Code of 1986.

Community-based nonprofit organization means a non-profit organization that maintains at least one-third of its governing board's membership for low-income residents from the local community, or for elected representatives

of community organizations that represent low-income residents.

Comparable market rents has the meaning given in § 401.410(b).

Disabled family has the meaning given in § 5.403(b) of this title.

Elderly family has the meaning given in § 5.403(b) of this title.

Eligible project means a project with a mortgage insured or held by HUD, project-based assistance expiring on or after October 1, 1998, and rents for assisted units exceeding comparable market rents; and otherwise meeting the definition of “eligible multifamily housing project” in section 512(2) of MAHRA.

HUD means the Director of the Office of Multifamily Housing Assistance Restructuring (OMHAR) or a HUD official authorized to act in lieu of the Director, when used in reference to provisions of MAHRA that give responsibilities to the Director, and otherwise has the meaning given in § 5.100 of this title.

NHA means the National Housing Act, 12 U.S.C. 1702 *et seq.*

Owner means the owner of a project and any purchaser of the project.

PAE means a participating administrative entity as defined in section 512(10) of MAHRA, or HUD when appropriate in accordance with section 513(b)(4) of MAHRA.

PCA means a physical condition assessment of a project prepared by a PAE under § 401.451.

PRA means a portfolio restructuring agreement as defined in section 512(9) of MAHRA.

Priority purchaser means a purchaser meeting qualifications established by HUD that is:

(1) A tenant organization or

(2) A tenant-endorsed community-based nonprofit organization or public agency.

Rental Assistance Assessment Plan means the plan described in section 515(c)(2) of MAHRA.

Restructured rent means the rent determined at the time of restructuring in accordance with section 514(g) of MAHRA.

Restructuring Plan means the Mortgage Restructuring and Rental Assistance Sufficiency Plan described in section 514 of MAHRA.

Section 8 means section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f.

Section 541(b) claim means a claim paid by HUD under an insurance contract under authority of section 541(b) of the National Housing Act, 12 U.S.C. 1735f-19(b).

Tenant organization means an organization that meets regularly, whose officers are elected by a majority of heads of households of occupied units, and whose membership is open to all tenants of a project.

Unit of local government means the smallest unit of general local government in which the project is located.

§ 401.99 What actions must an owner take to request a section 8 contract renewal?

(a) *Requesting Restructuring Plan.* An owner may request a section 8 contract renewal as part of a Restructuring Plan by, at least 3 months before the expiration date of any project-based assistance or as soon as practicable if the contract will expire before January 13, 1999, certifying to HUD that to the best of the owner's knowledge:

(1) Project rents are above comparable market rents; and

(2) Neither the owner nor any affiliate is suspended or debarred, or, if so, a voluntary sale transfer of the property is proposed in accordance with § 401.480.

(b) *Eligible but not requesting Restructuring Plan.* If an owner is eligible for a Restructuring Plan but requests a renewal of project-based assistance without a Plan, HUD will consider the request, in accordance with § 401.601 if, at least 3 months before the expiration date of any project-based assistance or as soon as practicable if the contract will expire before January 13, 1999, an owner provides to HUD the certification required in paragraph (a) of this section, and the following additional information:

(1) A comparable market rent analysis;

(2) The prior fiscal year's audited financial statement for the project;

(3) An owner's evaluation of physical condition as provided in § 401.450; and

(4) Such other documents as the PAE or HUD may require.

(c) *Not eligible for Restructuring Plan.* Section 402.5 of this chapter addresses renewal of project-based assistance for a project not eligible for a Restructuring Plan.

[63 FR 48943, Sept. 11, 1998; 63 FR 71373, Dec. 28, 1998]

§ 401.100 Which projects are eligible for a Restructuring Plan under this part?

A Restructuring Plan may be requested by an owner of an eligible project that:

(a) Has project-based assistance with an expiration date of October 1, 1998, or later;

(b) Has current gross potential rent for the project-based assisted units that exceeds the gross potential rent for the project based assisted units using comparable market rents; and

(c) Is not described in section 514(h) of MAHRA.

[63 FR 48943, Sept. 11, 1998; 63 FR 71373, Dec. 28, 1998]

§ 401.101 Which owners are ineligible for a Restructuring Plan?

The request of an owner of an eligible project for a Restructuring Plan will not be considered if the owner or an affiliate is debarred or suspended under part 24 of this title, unless a sale or transfer of the property is proposed in accordance with § 401.480.

Subpart B—Participating Administrative Entity (PAE) and Portfolio Restructuring Agreement (PRA)

§ 401.200 Who may be a PAE?

A PAE must qualify under the definition in section 512(10) of MAHRA. It must not have any outstanding violations of civil rights laws, determined in accordance with criteria in use by HUD. If the PAE is a private entity, whether nonprofit or for-profit, it must enter into a partnership with a public purpose entity, which may include HUD. The formed entity must meet all legal requirements for a partnership. A PAE may delegate responsibilities only as stated in the PRA.

§ 401.201 How does HUD select PAEs?

(a) *Selection of PAE.* HUD will select qualified PAEs in accordance with the criteria established in 513(b) of MAHRA and criteria established by HUD. The selection method is within HUD's discretion, including but not limited to a request for qualifications.

(b) *Priority for public agencies.* HUD will provide a one-time priority period for State housing finance agencies and local housing agencies to qualify as the PAEs for their jurisdictions. If more than one agency qualifies for the same jurisdiction, HUD will provide an opportunity for the agencies to allocate responsibility for projects in the jurisdiction. If the agencies are unable to agree, HUD will choose a PAE in accordance with section 513(b)(2) of MAHRA.

(c) *Qualification for PAE by nonprofit and for profit entities.* After the priority period expires, HUD will consider other eligible entities as PAEs for jurisdictions in which no public agency has qualified as the PAE, or for projects that have not been assigned to a qualified public agency.

(d) *No PAE for project.* If HUD does not select a PAE for a project, HUD may perform the functions of the PAE, or contract with other qualified entities to perform those functions.

[63 FR 48943, Sept. 11, 1998; 63 FR 71373, Dec. 28, 1998]

§ 401.300 What is a PRA?

A PRA is an agreement between HUD and a PAE that delineates rights and responsibilities in connection with development and implementation of a Restructuring Plan. The PRA must contain the matters required by section 513(a)(2) of MAHRA, and §§ 401.301 through 401.314, as well as other terms and conditions required by HUD.

[63 FR 48943, Sept. 11, 1998; 63 FR 71373, Dec. 28, 1998]

§ 401.301 Business arrangements.

If the PAE is in a partnership, the PRA must specify the following:

- (a) The responsibilities of each partner regarding the Restructuring Plan;
- (b) The resources each partner will provide to accomplish its designated responsibilities; and

- (c) All compensation to each partner, whether direct or indirect.

§ 401.302 PRA administrative requirements.

(a) *Inapplicability of certain requirements.* Parts 84 and 85 of this title and contract procurement requirements do not apply to a PRA.

(b) *Recordkeeping.* The PAE must keep complete and accurate records of all activities related to the PAE's performance under the PRA. The PAE must retain the records for at least 3 years after the PRA terminates.

(c) *Inspection of records and audit.* Upon reasonable notice, the PAE must permit the Comptroller General of the United States and HUD (including representatives of the HUD Office of Inspector General) to inspect, audit and copy any records required to be retained under this section.

401.303 PRA indemnity provisions for SHFAs and HAs.

When a PRA requires HUD to indemnify a PAE in accordance with section 513(a)(2)(G) of MAHRA, any payment under this indemnity is contingent upon the availability of funds that are permitted by law to be used for this purpose.

§ 401.304 PRA provisions on PAE compensation.

(a) *Base fee.* The PRA will provide for a base fee to be paid by HUD.

(b) *Incentives.* The PRA may provide for incentives to be paid by HUD for achievement of stated objectives.

(c) *Expenses.* The PRA will identify expenses incurred by the PAE that will qualify for reimbursement by HUD.

§ 401.307 On-going responsibility of PAE.

The PRA must provide for on-going activities necessary to implement the Restructuring Plan after the closing under § 401.407.

§ 401.309 PRA term and termination provisions; other remedies.

(a) *1-year term with renewals.* The PRA will have a term of 1 year, to be renewed for successive terms of 1 year with the mutual agreement of both parties. The PRA will provide for HUD

to pay final compensation to the PAE and to assign responsibility for continuing activities if the PRA is not renewed.

(b) *Termination for cause.* A PRA will be subject to termination by HUD at any time for cause, with payment required by HUD as provided in the PRA only for matters performed by the PAE to the date of termination. When cause for termination exists, HUD may order an immediate transfer of some or all of the PAE's duties to another PAE designated by HUD. HUD may temporarily waive its right of immediate termination for cause in order to allow an orderly transfer of duties and responsibilities under a PRA, without waiving the right of termination after the transfer has been completed to HUD's satisfaction. HUD will retain the right of set-off against any payments due as well as such other rights afforded at law and in equity.

(c) *Liability for damages.* During the term of a PRA, or notwithstanding any termination of a PRA, HUD may seek its actual, direct, and consequential damages from any PAE failure to comply with its obligations under the PRA.

(d) *Cumulative remedies.* The remedies under this section are cumulative and in addition to any other remedies or rights HUD may have under the terms of the PRA, at law, or otherwise.

§ 401.310 Conflicts of interest.

(a) *Definitions.* (1) *Conflict of interest.* A conflict of interest is a situation in which a PAE or other restricted person has:

(i) A financial interest in a matter relating to the PRA;

(ii) One or more personal, business, or financial interests or relationships which would cause a reasonable person with knowledge of the relevant facts to question the integrity or impartiality of those who are or will be acting under the PRA; or

(iii) Is taking an adverse position to HUD or to an owner whose project is covered by a PRA in a lawsuit, administrative proceeding or other contested matter.

(2) *Control* means the power to vote, directly or indirectly, 25 percent or more of any class of the voting stock of a company; the ability to direct in any

manner the election of a majority of a company (or other entity's) directors or trustees; or the ability to exercise a controlling influence over the company or entity's management and policies. For purposes of this definition, a general partner of a limited partnership is presumed to be in control of that partnership.

(3) *Restricted person* means a PAE; any management official of the PAE; any legal entity that is under the control of the PAE, is in control of the PAE or is under common control with the PAE; or any employee, agent or contractor of the PAE, or employee of such agent or contractor, who will perform or has performed services under a PRA with HUD.

(b) *General prohibitions.* (1) The PAE may not permit conflicts of interest to exist without obtaining a waiver in accordance with this section.

(2) The PAE must establish procedures to identify conflicts of interest and to ensure that conflicts of interest do not arise or continue, subject to waiver under paragraph (c) of this section.

(3) HUD will not enter into PRAs with potential PAEs who have conflicts of interest associated with a particular project, or permit PAEs to continue performance under existing PRAs when such PAEs have conflicts of interest, unless such conflicts have been eliminated to HUD's satisfaction by the PAE or potential PAE or are waived by HUD.

(4) The PAE has a continuing obligation to take all action necessary to identify whether it or any other restricted person has a conflict of interest.

(c) *Waivers.* HUD will waive conflicts of interest only when, in light of all relevant circumstances, the interests of HUD in the PAE's or another restricted persons's participation outweigh the concern that a reasonable person may question the integrity of HUD's operations.

(d) *Conflicts of interest arising prior to PAE selection.* (1) *Request for review of conflicts of interest.* (i) A potential PAE, with its request to HUD for consideration for selection as a PAE, must identify existing conflicts of interest and may make a written request for a

determination as to the existence of a conflict of interest, may request that the conflict of interest, if any, be waived, or may propose how it could eliminate the conflict.

(ii) If, after submitting a request but prior to selection, a potential PAE discovers that it has a conflict, it must notify HUD in writing within 10 days of submitting the request or prior to selection, whichever is earlier. The potential PAE may, with its notices, request that the conflict be waived or may propose how it may eliminate the conflict. The potential PAE may also request a determination as to the existence of the conflict.

(2) *Review by HUD.* Subject to the restrictions set forth in this section, HUD in its sole discretion may determine whether a conflict of interest exists, may waive the conflict of interest, or may approve in writing a PAE's proposal to eliminate a conflict of interest.

(e) *Conflicts of interest that arise or are discovered after PAE selection.* (1) A PAE must notify HUD in writing within 10 days after discovering that it or another restricted person has a conflict of interest. Such notification must contain a detailed description of the conflict of interest and state how the PAE intends to eliminate the conflict. The PAE may also request a determination as to the existence of a conflict.

(2) HUD will, after receipt of such notification or other discovery of the PAE's conflict or potential conflict of interest, take such action as it determines is in its best interests, which may involve proceeding under § 401.313 or as provided in paragraph (e)(2) of this section. HUD may notify the PAE in writing of its findings as to whether a conflict of interest exists and the basis for such determination, whether or not a waiver will be granted, or whether corrective actions may be taken in order to eliminate the conflict of interest. Corrective action must be completed by the PAE not later than 30 days after notification is mailed by HUD unless HUD, at its sole discretion, determines that it is in its best interests to grant the PAE an extension in which to complete the corrective action.

(f) *Reconsideration of decisions.* Decisions issued pursuant to this section may be reconsidered by HUD upon application by the PAE. Such requests must be in writing and must contain the basis for the request. HUD may, at its discretion and after determining that it is in its best interests, stay any corrective or other actions previously ordered pending reconsideration of a decision.

§ 401.311 Standards of conduct.

(a) *Minimum ethical standards for PAEs.* In connection with the performance of any PRA and during the term of such PRA, a PAE or other restricted person (as defined in § 401.310) may not:

(1) Solicit for itself or others favors, gifts, or other items of monetary value from any person who is seeking official action from HUD or the PAE in connection with the PRA or has interests which may be substantially affected by the restricted person's performance or nonperformance of duties to HUD;

(2) Use improperly or allow the improper use of HUD property, or property over which the restricted person has supervision or charge by reason of the PRA;

(3) Use its status as PAE for its own benefit, or the financial or business benefit of a third party, except as contemplated by the PRA; or

(4) Make any unauthorized promise or commitment on behalf of HUD.

(b) *18 U.S.C. 201.* Pursuant to 18 U.S.C. 201, whoever acts for or on behalf of HUD in connection with the matters covered by this part is deemed to be a public official. Public officials are prohibited from soliciting or accepting anything of value in return for being influenced in the performance of official actions. Violators are subject to criminal sanctions.

(c) *18 U.S.C. 1001.* Pursuant to 18 U.S.C. 1001, whoever knowingly and willingly falsifies a material fact, makes a false statement or utilizes a false writing in connection with a PRA is subject to criminal sanctions. Other Federal civil statutes also apply to making false statements to the United States.

(d) *18 U.S.C. 207.* Former government employees are subject to the prohibitions found at 18 U.S.C. 207.

§ 401.312 Confidentiality of information.

A PAE and every other restricted person (as defined in § 401.310) has a duty to protect confidential information and to prevent its use to further a private interest other than as contemplated by the PRA. As used in this section, confidential information means information that a PAE or other restricted person obtains from or on behalf of HUD or a third party in connection with a PRA but does not include information generally available to the public unless the information becomes available to the public as a result of unauthorized disclosure by the PAE or another restricted person.

§ 401.313 Consequences of PAE violations; finality of determination.

(a) *Effect on PRA.* If a PAE, potential PAE or other restricted person (as defined in § 401.310) violates §§ 401.310, 401.311, or 401.312, HUD may:

(1) Find the PAE unqualified to enter into a PRA, or unqualified to receive additional projects for restructuring under an existing PRA;

(2) Find the PAE in default under an existing PRA with the right of termination for cause under § 401.309; or

(3) Seek its actual, direct, and consequential damages from a PAE whose conflicts of interest, failure to comply with confidentiality requirements, or failure to comply with the minimum ethical standards for PAEs that were the basis for termination of a PRA.

(b) *Cumulative remedies.* The remedies under this section are cumulative and in addition to any other remedies or rights HUD may have under the terms of the PRA, at law, or otherwise.

(c) *Finality of determination.* Any determination made by HUD pursuant to this section is at HUD's sole discretion and is not subject to further administrative review.

§ 401.314 Environmental review responsibilities.

HUD will retain all responsibility for environmental review under part 50 of this title. Any required review will be completed before any HUD execution of the Restructuring Commitment under § 401.405.

Subpart C—Restructuring Plan**§ 401.400 Required elements of a Restructuring Plan.**

(a) *General.* A PAE is responsible for the development of a Restructuring Plan for each project included in its PRA.

(b) *Required elements.* The Restructuring Plan must contain a narrative that fully describes the restructure transaction. The Restructuring Plan must include the elements required at section 514(e) of MAHRA. The Restructuring Plan must describe the use of any restructuring tools listed at section 517(a) and (b) of MAHRA, and must contain other requirements as determined by HUD.

[63 FR 48943, Sept. 11, 1998; 63 FR 71373, Dec. 28, 1998]

§ 401.401 Consolidated Plans.

A PAE may request HUD to approve a Consolidated Restructuring Plan that presents an overall strategy for more than one project included in the PRA. HUD will consider approval of a Consolidated Restructuring Plan for projects having common ownership, geographic proximity, common mortgagee or servicer, or other factors that contribute to more efficient use of the PAE's resources. Notwithstanding the more efficient use of a PAE's resources, HUD will not approve any Consolidated Restructuring Plans that have a detrimental effect on tenants or the community, or a higher cost to the Federal government.

§ 401.402 Cooperation with owner and qualified mortgagee in Restructuring Plan development.

A PAE must comply with section 514(a)(2) of MAHRA by using its best efforts to seek the cooperation of the owner and qualified mortgagee or its designee in the development of the Restructuring Plan. If the owner fails to cooperate to the satisfaction of the PAE and HUD agrees, the PAE must notify the owner that the PAE will not develop a Restructuring Plan. This notice will be a final decision subject to dispute and administrative appeal under subpart F of this part. If the qualified mortgagee does not cooperate in modifying the mortgage, the PAE

and owner may continue to develop a Restructuring Plan to restructure the loan using alternative financing.

§ 401.403 Rejection of a request for a Restructuring Plan because of actions or omissions of owner or affiliate or project condition.

(a) *Ongoing determination of owner and project eligibility.* Notwithstanding an initial determination to accept the owner's request for a Restructuring Plan, the PAE is responsible for a further more complete and ongoing assessment of the eligibility of the owner and project while the Restructuring Plan is developed. The PAE must advise HUD if at any time any of the grounds for rejection listed in paragraph (b) of this section exist.

(b) *Grounds for rejection.* HUD may elect not to permit continued consideration of the Restructuring Plan if at any time before closing under § 401.407:

(1) The owner or an affiliate is debarred or suspended under part 24 of this title;

(2) HUD or the PAE determines that the owner or an affiliate has engaged in material adverse financial or managerial actions or omissions as described at section 516(a) of MAHRA, including any outstanding violations of civil rights laws in connection any project of the owner or affiliate; or

(3) HUD or the PAE determines that the project does not meet the housing quality standards in § 401.453 and that the poor condition of the project is not likely to be remedied in a cost-effective manner through the Restructuring Plan.

(c) *Dispute and appeal.* An owner may dispute a rejection under this section and seek administrative review under the procedures in subpart F of this part.

[63 FR 48943, Sept. 11, 1998; 63 FR 71373, Dec. 28, 1998]

§ 401.404 Proposed Restructuring Commitment.

A PAE must submit a Restructuring Plan and a proposed Restructuring Commitment to HUD for approval, prior to submitting the Commitment to the owner for execution. The proposed Restructuring Commitment must be in a form approved by HUD,

incorporate the Restructuring Plan, and include the following:

(a) The lender, loan amount, interest rate, and term of any mortgages or unsecured financing for the mortgage restructuring and rehabilitation, and any credit enhancement;

(b) The amount of any payment of a section 541(b) claim;

(c) The type of section 8 assistance and the section 8 restructured rents;

(d) The rehabilitation required, the source of the owner contribution, and escrow arrangements;

(e) The uses for project accounts;

(f) The terms of any sale or transfer of the project; and

(g) A schedule setting forth all sources and uses of funds to implement the Restructuring Plan, including setting forth the balances of project accounts before and after restructuring; and

(h) Other terms and conditions prescribed by HUD.

§ 401.405 Restructuring Commitment review and approval by HUD.

HUD will either approve the Restructuring Commitment as submitted, require changes as a condition for approval, or reject the Plan. If the Plan is rejected, HUD will inform the PAE of the reasons for rejection. HUD's rejection of the Plan is subject to the dispute and administrative appeal provisions of subpart F of this part.

§ 401.406 Execution of Restructuring Commitment.

When HUD approves the Restructuring Commitment, the PAE will deliver the Restructuring Commitment to the owner for execution. The Restructuring Commitment becomes binding upon execution by the owner. An owner who does not execute the Restructuring Commitment may appeal its terms and seek modification under subpart F of this part.

§ 401.407 Closing conducted by PAE.

After the owner has executed the Restructuring Commitment, the PAE must arrange for a closing to execute all documents necessary for implementation of the Restructuring Plan. The PAE must use standard documents approved by HUD, with modifications

only as necessary to comply with applicable State or local laws, or such other modifications as are approved in writing by HUD.

§ 401.408 Affordability and use restrictions required.

(a) *General.* The Restructuring Plan must provide that the project will be subject to affordability and use restrictions in a Use Agreement acceptable to HUD. The Use Agreement must be recorded and in effect for at least 30 years. It must include at least the provisions required by this section.

(b) *Use restriction.* The project must continue to be used for residential use with no reduction in the number of residential units without prior HUD approval.

(c) *Affordability restrictions.* Except during a period when at least 20 percent of the units in a project receive project-based assistance:

(1) At least 20 percent of the units in the project must be leased to families whose adjusted income does not exceed 50 percent of the area median income as determined by HUD, with adjustments for household size, at rents no greater than 30 percent of 50 percent of the area median income; or

(2) At least 40 percent of the units in the project must be leased to families whose adjusted income does not exceed 60 percent of the area median income as determined by HUD, with adjustments for household size, at rents no greater than 30 percent of 60 percent of the area median income.

(d) *Comparable configuration.* The type and size of the units that satisfy the affordability restrictions of paragraph (c) of this section must be comparable to the type and size of the units for the project as a whole.

(e) *Owner obligation to accept assistance.* Subject to the availability of appropriated funds, the owner of the project must accept any offer of project-based or tenant-based assistance renewal or extension so long as the offer is in accordance with the terms and conditions specified in the Restructuring Plan.

(f) *Reporting.* The Use Agreement must contain appropriate financial and other reporting requirements for the owner.

(g) *Enforcement and amendment.* The Use Agreement will be enforceable by interested parties to be specified in the Agreement, which may include HUD, the PAE, project tenants, organizations representing project tenants, and the unit of local government.

(h) *Modifications.* HUD will retain the right to approve modifications of the Use Agreement agreed to by the owner without the consent of any other party, including those having the right of enforcement.

§ 401.410 Standards for determining comparable market rents.

(a) *When are comparable market rents required?* The Restructuring Plan must establish restructured rents at comparable market rents unless the PAE finds that exception rents are necessary under § 401.411.

(b) *Comparable market rents defined.* Comparable market rents are the rents charged for properties that the PAE determines to be comparable properties as defined in section 512(1) of MAHRA, except that projects assisted under part 891 of this title may not be taken into account. For purposes of section 512(1), other relevant characteristics include any applicable rent control and other characteristics determined by the PAE.

(c) *Methodology for determining comparable market rents.* If the PAE is unable to identify at least three comparable properties within the local market, the PAE may:

(1) Use non-comparable housing stock within that market from which adjustments can be made; or

(2) If necessary to go outside the market, use comparable properties as far outside the local market as it finds reasonable, from which adjustments can be made.

(d) *Using FMR as last resort.* If the PAE is unable to identify enough properties under paragraph (c) of this section, the rents must be set at 90 percent of the Fair Market Rents for the relevant market area.

§ 401.411 Guidelines for determining exception rents.

(a) *When do exception rents apply?* (1) The Restructuring Plan may provide for exception rents established under

section 514(g)(2) of MAHRA if the PAE determines that project income under the rent levels established under § 401.410 would be inadequate to meet the costs of operating the project as described in paragraph (b) of this section and that the housing needs of the tenants and the community could not be adequately addressed.

(2) In any fiscal year, the PAE may not request HUD to approve Restructuring Plans with exception rents for more than 20 percent of all units covered by the PRA, except that HUD may approve a waiver of this 20 percent limitation based on the PAE's narrative explanation of special need.

(b) *How are exception rents calculated?* Exception rents must be set at a level sufficient to support the costs of operating the project. The PAE must take into account the cost items listed in section 514(g)(3)(A) through (E) of MAHRA, except that debt service is limited to payment of the second mortgage under § 401.461(a) or a rehabilitation loan included in the Restructuring Plan. The exception rent must not exceed 120 percent of the Fair Market Rent for the market area, except that HUD may approve an exception rent greater than 120 percent of Fair Market Rent, based on a narrative explanation of special need submitted by the PAE, subject to the 5 percent limitation in section 514(g)(2)(A) of MAHRA.

[63 FR 48943, Sept. 11, 1998; 63 FR 71373, Dec. 28, 1998]

§ 401.412 Adjustment of rents with operating cost adjustment factor (OCAF).

(a) *OCAF required for Restructuring Plan.* The Restructuring Plan must provide for annual adjustment of the restructured rents by an OCAF determined by HUD and applied as provided in this section. An OCAF may be positive or negative.

(b) *Application of OCAF.* HUD will apply the OCAF to the previous year's contract rent less the portion of that rent paid for debt service. Paragraph (b) of this section applies to renewals of contracts in subsequent years which receive restructured rents under either section 514(g)(1) or (2) of MAHRA.

§ 401.420 When must the Restructuring Plan require project-based assistance?

(a) *Criteria in MAHRA.* The Restructuring Plan must provide for the section 8 contract to be renewed as project-based assistance, subject to the availability of funds for this purpose, if the PAE determines that one or more of the circumstances described in section 515(c)(1)(A), (B), or (C) of MAHRA exists.

(b) *Meaning of "predominant".* For purposes of section 515(c)(1)(B), project has a predominant number of units occupied by elderly families, disabled families, or elderly and disabled families if at least 50 percent of the units are occupied by these families.

(c) *Tight rental market.* The conditions of section 515(c)(1)(A) are met if the PAE determines that there is a market-wide vacancy rate of 6 percent or less.

§ 401.421 Rental Assistance Assessment Plan.

(a) *Plan required.* For any project not subject to mandatory project-based assistance under § 401.420, the PAE must develop a Rental Assistance Assessment Plan in accordance with section 515(c)(2) of MAHRA to determine whether assistance should be renewed as project-based assistance or whether some or all of the assisted units should be converted to tenant-based assistance.

(b) *Matters to be assessed.* The PAE must consider the cost of providing assistance, comparing the applicable payment standard for tenant-based assistance to the project's adjusted rent levels determined under § 401.410 or § 401.411. In addition, the PAE must consider the other matters listed in section 515(c)(2)(B) of MAHRA to be assessed as part of the Plan, and the applicable Consolidated Plan developed under part 91 of this title.

(c) *Conversion may be phased in.* Any conversion from project-based assistance to tenant-based assistance may occur over a period of not more than 5 years if the PAE decides the transition period is needed for the financial viability of the project.

(d) *Reports to HUD.* The PAE must report to HUD on the matters specified

in section 515(c)(2)(C) of MAHRA at least semi-annually.

§ 401.450 Owner evaluation of physical condition.

(a) *Initial evaluation.* The owner must evaluate the physical condition of the project and provide the following information to the PAE in a form acceptable to the PAE:

(1) All work items required to bring the project to the standard in § 401.452;

(2) The capital repair or replacement items that will be necessary to maintain the long-term physical integrity of the property;

(3) A plan for funding the rehabilitation work included in paragraph (a)(1) of this section, which work must be completed in a timely manner after closing the restructuring transaction, that identifies the source of the required owner contribution of non-project funds; and

(4) An estimate of the initial deposit, if any, and the estimated monthly deposit to the reserve for replacement account for the next 20 years.

(b) *Reconsideration and modification of evaluation.* If the PAE, after its independent review under § 401.451, determines that the owner's evaluation either fails to address specific necessary work items or fails to propose a cost-effective approach to rehabilitation, the owner may modify its evaluation to satisfy the concerns of the PAE.

§ 401.451 PAE Physical Condition Analysis (PCA).

(a) *Review and certification of owner evaluation.* (1) The PAE must independently evaluate the physical condition of the project by means of a PCA. If the PAE finds any immediate threats to health and safety, the owner must complete those work items immediately, or the PAE must evaluate the project's eligibility in accordance with § 401.403(b)(3).

(2) After consultation with the owner and an opportunity for the owner to modify its evaluation performed under § 401.450, the PAE must certify to the accuracy and completeness of the owner's evaluation performed under § 401.450 for each project covered by the PRA or state that the evaluation fails

to address certain items or does not propose a cost effective approach.

(b) *Rejection for inaccurate or incomplete owner evaluation.* If the PAE cannot certify to the accuracy and completeness of the owner's evaluation due to its failure to address specific work items or because it does not propose a cost effective approach, the PAE must notify HUD. If HUD agrees with the PAE's determination, the PAE must notify the owner that the request for a Restructuring Plan is rejected.

(c) *Rejection for lack of cost-effectiveness.* Based on the completed PCA, the PAE must determine whether proceeding with a Restructuring Plan with necessary rehabilitation is more cost-effective in terms of Federal resources than rejecting the Request for a Restructuring Plan under § 401.403(b)(3) and providing tenant-based assistance for displaced tenants under § 401.602. HUD will provide guidance to PAEs for making the cost-effectiveness determination. If the PAE concludes that a request for a Restructuring Plan should be rejected because of lack of cost-effectiveness, it must also consider the effect on tenants and the community and advise HUD of the effect.

(d) *Dispute and appeal of rejection.* The dispute and appeal provisions of subpart F of this part apply to rejections under paragraphs (b) and (c) of this section.

§ 401.452 Property standards for rehabilitation.

The Restructuring Plan must provide for the level of rehabilitation needed to restore the property to the non-luxury standard adequate for the rental market for which the project was originally approved. If the standard has changed over time, the rehabilitation may include improvements to meet current standards. The result of the rehabilitation should be a project that can attract non-subsidized tenants but competes on rent rather than on amenities. When a range of options exists for satisfying the rehabilitation standard or the plan for capital replacement, the PAE must choose the least costly option considering both capital and operating costs and taking into account the remaining useful life of all building

systems. Nothing in this part exempts rehabilitation from the requirements of part 8 of this title concerning accessibility to persons with disabilities.

§ 401.453 Housing quality standards.

(a) *Standards.* The Restructuring Plan must require the owner to maintain the project, for the duration of the Use Agreement under § 401.408, in a decent and safe condition that meets the applicable standards under this section. As long as project-based assistance is provided, the applicable standards are the physical conditions standards for HUD housing in § 5.703 of this title. At any other time, the applicable standards are the local housing codes or codes adopted by the public housing agency if such codes meet or exceed the standards in § 5.703 of this title and do not severely restrict housing choice or, if there are no such local housing codes or codes adopted by the public housing agency, the standards in § 5.703 will apply. In addition, any unit in which the tenant receives tenant-based assistance must comply with the housing quality standards of the section 8 tenant-based programs.

(b) *Reserves.* The Restructuring Plan must also provide for reserves for capital replacement sufficient to assure the property's long term structural integrity so that the property can be maintained as affordable housing in decent and safe condition meeting the standards of this section.

§ 401.460 Modification or refinancing of first mortgage.

(a) *Principal amount.* As part of the Restructuring Plan, the PAE will determine the size of the restructured first mortgage that will result from the modification or refinancing of the existing FHA-insured or HUD-held first mortgage. The restructured first mortgage must be in the amount that can be supported by net operating income based on the lower of the restructured section 8 rents or the rents allowed by the Use Agreement under § 401.408. Neither the outstanding principal balance of the existing first mortgage, nor the monthly principal and interest payments on that debt, may be increased through the Restructuring Plan. The debt service coverage used by the PAE

must be adequate for purposes of the Restructuring Plan and for the requirements of any refinancing.

(b) *Fully amortizing.* The modified or refinanced first mortgage must be fully amortizing through level monthly payments.

(c) *Rates and other terms.* Interest rates and other terms of the modified or refinanced first mortgage must be competitive in the market.

(d) *Fees.* Any fees or costs associated with mortgage modification or refinancing determined by the PAE to be above normal processing fees must be paid by the owner from non-project funds and must not be included in the modified or refinanced first mortgage.

(e) *Refinancing.* (1) If the holder of the existing FHA-insured first mortgage does not agree to modify and re-amortize the outstanding loan, the loan must be refinanced.

(2) The refinancing may be either without credit enhancement or with credit enhancement under one of the following:

(i) *FHA mortgage insurance.* If the Restructuring Plan provides for FHA mortgage insurance for the refinanced first mortgage, the insurance will be provided in accordance with all usually applicable FHA legal requirements except that insurance will be documented as provided in section 517(b)(2) of MAHRA. HUD will issue the commitment for mortgage insurance but may adapt its procedures as necessary to facilitate development and implementation of a Restructuring Plan.

(ii) *Other FHA credit enhancement.* If FHA credit enhancement, including risk-sharing, is provided under part 266 of this title, the credit enhancement will be provided in accordance with all usually-applicable FHA legal requirements under part 266 of this title, except that special approval from HUD will be required before the PAE engages in risk-sharing with FHA under part 266 of this title.

(iii) *Credit enhancement from non-FHA sources.* If credit enhancement is to be provided by a non-FHA source under section 517(b)(4) of MAHRA, HUD will consider waiver of any non-statutory provision in this part only if the waiver will not materially impair achievement of the purposes of MAHRA and if

the waiver is essential to meet the legitimate business or legal requirements of the provider of credit enhancement.

§ 401.461 HUD-held second mortgage.

(a) *Amount.* If the Restructuring Plan provides for payment of a section 541(b) claim, the Plan must also provide for a second mortgage to HUD in an amount that does not exceed the amount that the PAE reasonably expects to be repaid based on objective criteria such as the amount of anticipated net cash flow, trending assumptions, amortization provisions, and expected residual value of the project. The second mortgage also must not exceed the difference between the unpaid principal balance on the first mortgage immediately before and after restructuring.

(b) *Terms and conditions.* (1) The second mortgage must have an interest rate of at least 1 percent, but not more than the applicable Federal rate. Interest will accrue but not compound.

(2) The second mortgage must have a term concomitant with the modified or refinanced first mortgage. HUD may provide that if the first mortgage of a nominal amount is satisfied, the second mortgage may continue for a term established by HUD.

(3)(i) Principal and interest on the second mortgage is payable only out of net cash flow during its term. "Net cash flow" means that portion of project income that remains after the payment of all required debt service payments on the modified or refinanced first mortgage, if any, including payment of any past due principal or interest, and payment of all reasonable and necessary operating expenses (including deposits to the reserve for replacement account) and any other expenditure approved by HUD.

(ii) The priority and distribution of net cash flow is as follows:

(A) HUD or the PAE may approve the payment to the owner of up to 25 percent of net cash flow based on consideration of relevant conditions and circumstances including, but not limited to, the project management meeting the management standards prescribed in § 401.484 and the project meeting the housing quality standards prescribed in § 401.453; and

(B) All remaining net cash flow will be applied to the principal and interest on the second mortgage, until paid in full, and then to any additional subordinate mortgage under § 401.461(c).

(4) HUD may cause the second mortgage to be immediately due and payable on the grounds provided in section 517(a)(4) of MAHRA, including an assumption of the mortgage in violation of HUD standards for approval of transfers of physical assets (if applicable), or if the owner fails to comply with other HUD requirements after a reasonable opportunity for the owner to cure such failure. A decision by HUD in this regard is subject to the administrative appeals procedure in subpart F of this part.

(5) HUD will consider modification or forgiveness of all or part of the second mortgage only if the project has been sold or transferred to a priority purchaser under § 401.480 and HUD determines that modification or forgiveness is necessary to recapitalize the project in order to preserve it as affordable housing.

(c) *Additional mortgage to HUD.* If the amount of a section 541(b) claim under § 401.471 exceeds the principal amount of the second mortgage, a Restructuring Plan may require the owner to give an additional mortgage on the project to HUD to secure repayment of that portion of the claim that is not already secured. This additional mortgage must be junior in priority to the second mortgage required by paragraph (a) of this section, bear interest at the same rate which will accrue but not compound, and require no payments except payment in full when the second mortgage is satisfied.

[63 FR 48943, Sept. 11, 1998; 63 FR 71373, Dec. 28, 1998]

§ 401.471 HUD payment of a section 541(b) claim.

HUD will pay a section 541(b) claim from the appropriate insurance fund to the insured mortgagee on behalf of the mortgagor to reduce the principal balance of the insured mortgage as provided in the Restructuring Plan. All section 541(b) claims will be paid in cash. Part 207 of this title and sections 207(g) and 541(a) of the NHA do not apply to a section 541(b) claim.

§ 401.472 Rehabilitation funding.

(a) *Sources of funds.* (1) *Project accounts.* The Restructuring Plan for funding rehabilitation must include funds from the project's residual receipts account, surplus cash account, replacement reserve account and other project accounts, to the extent the PAE determines that those accounts will not be needed for the initial deposit to the reserves.

(2) *Debt restructuring.* The Restructuring Plan may provide for funding of rehabilitation through a new first mortgage in conjunction with a payment of a section 541(b) claim. The payment of claim may be in an amount necessary to facilitate the funding of the rehabilitation, by reducing the existing first mortgage debt to make refinancing proceeds available to fund rehabilitation.

(3) *Section 236(s) rehabilitation grant.* The Restructuring Plan may include a direct grant from HUD under section 236(s) of the NHA to cover a portion of the rehabilitation cost, to the extent that HUD has determined that funding is available for such a grant.

(4) *Section 8 budget authority increase.* The Restructuring Plan may include funding of rehabilitation from budget authority provided to HUD for increases in section 8 contracts, to the extent that HUD has determined that funding from this source is available.

(b) *Statutory restrictions.* Any rehabilitation funded from the sources described in paragraph (a) of this section is subject to the requirements in section 517(b)(7) of MAHRA for an owner contribution. The required owner contribution will be calculated as 20 percent of the total cost of rehabilitation, unless it is determined that a higher percentage is required. The PAE may exempt housing cooperatives from the owner contribution requirement.

(c) *Escrow agent.* The Restructuring Plan must provide for progress payments for rehabilitation, which must be disbursed by an acceptable escrow agent subject to PAE oversight or as otherwise provided by HUD.

[63 FR 48943, Sept. 11, 1998; 63 FR 71374, Dec. 28, 1998]

§ 401.473 HUD grants for rehabilitation under section 236(s) of NHA.

HUD will consider a direct grant for rehabilitation under section 236(s) of the NHA only if the owner provides an acceptable work schedule and cost-analysis that is consistent with the owner's evaluation of physical condition under § 401.450, as certified by the PAE. The owner must execute a grant agreement with terms and conditions acceptable to HUD. If the PAE is a State or local government, or an agency or instrumentality of such a government, the PAE and HUD may agree that the PAE will be delegated the responsibility for the administration of any grant made under § 401.473, if HUD has determined that funding for the cost of grant administration is available.

§ 401.474 Project accounts.

(a) *Accounts from other projects.* The accounts listed in 401.472(a)(1) may be used for other eligible projects only if:

(1) The projects are included in a Consolidated Restructuring Plan under § 401.401; and

(2) The funds are used for rehabilitation or to reduce a section 541(b) claim paid by HUD under § 401.471.

(b) *Distribution to owner.* The Restructuring Plan may provide for a one-time distribution to the owner, not to exceed 10 percent of the excess funds in project accounts, after completion of the rehabilitation required by the Restructuring Plan.

§ 401.480 Voluntary sale or transfer of project.

(a) *May the owner request a Restructuring Plan that includes a sale or transfer of the property?* The owner may request a Restructuring Plan that includes a condition that the property be sold or transferred to a purchaser acceptable to HUD in a reasonable period to consummate the transaction. The failure to consummate a sale or transfer of the property requested under paragraph (a) of this section will neither adversely affect an owner's eligibility for a Restructuring Plan nor exempt the owner from the requirements of § 401.600.

(b) *When must the Restructuring Plan include a sale or transfer of the property?*

If the owner is determined ineligible pursuant to § 401.101 or § 401.403, the Restructuring Plan must include a condition that the owner sell or transfer the property to a purchaser acceptable to HUD.

(c) *Owner's notice of intent to sell or transfer.* If a sale or transfer is required under paragraph (b) of this section:

(1) The owner must provide notice to the PAE affirming the owner's intent to sell or transfer the property. This notice must be received by the PAE no later than 30 days after a notice of rejection under § 401.101 or § 401.403 has become a final determination under subpart F of this part.

(2) The owner must cooperate in selling or transferring the property. Failure to do so will result in the PAE's determination to reject the owner's request for a Restructuring Plan. The owner must distribute and publish, in an appropriate publication, a notice to potential purchasers that describes the property, proposed terms of sale, and procedures for submitting a purchase offer. The notice in form and substance must be acceptable to HUD, and must inform potential offerors of a preference for priority purchasers.

(3) The PAE may develop a Restructuring Plan involving a sale or transfer to a non-priority purchaser only if the PAE determines that there is no interested qualified priority purchaser, or that a feasible Restructuring Plan involving a sale or transfer to a qualified priority purchaser cannot be developed.

(d) *Informing PAE; approval required.* The owner must inform the PAE of any offer to purchase the property and the owner must advise the PAE of the substance and on-going status of the owner's discussions with any prospective purchaser. The owner's acceptance of the offer must be subject to PAE approval, and HUD approval of the Restructuring Plan.

§ 401.481 Subsidy layering limitations on HUD funds.

(a) *PAE subsidy layering certification required for Restructuring Plan.* The PAE must certify to HUD that any Restructuring Plan for which it submits a proposed Restructuring Commitment meets the requirements of either paragraph (d) or (e) of this section.

(b) *Purpose of subsidy layering certification.* The purpose of the subsidy layering certification is to ensure that any HUD assistance provided to the owner of a project pursuant to a Restructuring Plan is no more than is necessary to permit the project to continue to house tenants with an income mix comparable to the income mix of the project before the Restructuring Plan is implemented, after taking into account other Government assistance described in section 102(b)(1) of the Department of Housing and Urban Development Act of 1989 (42 U.S.C. 3545(b)(1)).

(c) *Relationship to section 102(d) of HUD Reform Act.* HUD is not required to perform a separate subsidy layering analysis under section 102(d) of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3545(d)), section 911 of the Housing and Community Development Act of 1992 (42 U.S.C. 3545 note), or § 4.13 of this title for any HUD assistance that is included in the Restructuring Plan. HUD will adopt the PAE certification under this section if a HUD certification would otherwise be required under section 102(d).

(d) *Certification under existing HUD guidelines.* If the PAE has delegated authority from HUD to make section 102(d) subsidy layering certifications in accordance with section 911 of the Housing and Community Development Act of 1992, the PAE may comply with this section by using a procedure substantially similar to the procedure described in the Administrative Guidelines published on December 15, 1994 (59 FR 64748), or any subsequent procedure adopted by HUD to implement section 911.

(e) *Other procedures.* If the PAE does not have the delegated authority described in paragraph (d) of this section, the PAE must submit to HUD for approval proposed procedures for making the subsidy layering certification under this section. Any procedures must conform to the procedures described in paragraph (d) of this section to the extent feasible and appropriate.

§ 401.483 Leasing units to certificate and voucher holders.

A Restructuring Plan must prohibit any refusal of the owner to lease a unit

solely because of the status of the prospective tenant as a section 8 certificate or voucher holder.

§ 401.484 Property management standards.

(a) *General.* Each PAE is required by section 518 of MAHRA to establish management standards consistent with industry standards and HUD guidelines. The management standards must be included or referenced in the Restructuring Plan.

(b) *HUD guidelines.* At a minimum, the PAE's management standards must require the project management to:

(1) Protect the physical integrity of the property over the long term through preventative maintenance, repair or replacement;

(2) Ensure that the building and grounds are routinely cleaned;

(3) Maintain good relations with the tenants;

(4) Protect the financial integrity of the project by operating the property with competitive and reasonable costs and maintaining appropriate property and liability insurance at all times;

(5) Take all necessary measures to ensure the tenants' physical safety; and

(6) Comply with other provisions that are required by HUD, including termination of the management agent for cause.

(c) *Conflicts of interest.* The PAE management standards must also conform to any guidelines established by HUD, and industry standards, governing conflicts of interest between owners, managers and contractors.

§ 401.500 Required notices to third parties.

(a) *General.* The PAE must solicit, and document the consideration of, tenant and local community comments. As a minimum, the notices described in paragraphs (b) and (c) of this section, in form and substance acceptable to HUD, must be provided. The PAE may require the owner to give the notices if permitted by HUD.

(b) *Notice of intent to restructure and consultation meeting.* (1) This notice must include at a minimum:

(i) The project, including its name and FHA Project Number;

(ii) The responsible PAE and contact person, including the address and telephone number;

(iii) The owner's notice of intent to restructure through the Mark-to-Market Program; and

(iv) The date of expiration of the project-based assistance.

(2) This notice must state how comments may be provided to the PAE regarding any of the following: the physical condition of the property, whether the rental assistance should be tenant-based or project-based, any proposed sale or transfer of the property, and other matters regarding the property and its management. The notice must establish the date, time and place for a public meeting to be held no sooner than 20 days and no later than 60 days following the date of this notice. The public may provide written comments up to the date of the meeting.

(c) *Notice of completion of Restructuring Plan.* Within 10 days after either the execution of the Restructuring Commitment or a decision not to restructure, the PAE must provide a notice that describes the completed Restructuring Plan and Restructuring Commitment or the reasons not to restructure. Any completed Restructuring Plan and Restructuring Commitment must be made available during normal business hours to the public, subject to Federal, State and local laws restricting access to any information in any of these documents.

§ 401.501 Who is entitled to receive notices under § 401.500?

(a) *Recipients of all notices.* Each notice required under § 401.500 must be given to:

(1) The tenant for each unit in the project or a tenant organization; and

(2) The Chief Executive Officer of the unit of local government and the Director of the Public Housing Authority with jurisdiction over the project location.

(b) *Other recipients.* The PAE may require notices to be sent to neighborhood representatives and other affected parties identified by the PAE or HUD.

Subpart D—Implementation of the Restructuring Plan After Closing**§ 401.550 Monitoring and compliance agreements.**

(a) *Compliance agreements.* The PAE must ensure long-term compliance by the owner with MAHRA, this part, and the Restructuring Plan. As part of this responsibility, the PAE must require each owner with an approved Restructuring Plan to record and execute a Use Agreement that satisfies the requirements of § 401.408.

(b) *Periodic monitoring and inspection.* At least once a year for the term of the Use Agreement, a PAE must review the status of each project for which it developed an approved Restructuring Plan. Monitoring must include on-site inspections.

(c) *HUD acting instead of PAE.* HUD will perform, or contract with other parties to perform, the PAE's functions under this section if:

(1) The project is subject to a PRA with a PAE that is not qualified to be a section 8 contract administrator; or

(2) There is no PAE because the project is not currently subject to a PRA.

§ 401.552 Servicing of second mortgage.

HUD or its designee will be responsible for servicing the second mortgage, including determining the amounts receivable by the owner under § 401.461(b)(3)(ii)(A). HUD may designate the PAE, with the PAE's consent, as servicer for the second mortgage.

[63 FR 48943, Sept. 11, 1998; 63 FR 71374, Dec. 28, 1998]

§ 401.554 Contract administration.

HUD will offer to any PAE that is qualified to be the section 8 contract administrator the opportunity to serve as the section 8 contract administrator for a project restructured under the Mark-to-Market Program. Qualifications will be determined under both statutory requirements and requirements issued by the appropriate office within HUD, depending on the type of section 8 assistance that is provided.

Subpart E—Section 8 Requirements for Restructured Projects**§ 401.595 Contract and regulatory provisions.**

The provisions of chapter VIII of this title will apply only to the extent, if any, provided in the contract. Part 983 of this title will not apply.

§ 401.600 Will a section 8 contract be extended if it would expire while an owner's request for a Restructuring Plan is pending?

If a contract for an eligible project would expire before a Restructuring Plan is implemented, the contract may be extended at current rents for up to the earlier of 1 year or closing on the Restructuring Plan under § 401.407, with a provision for earlier termination if the PAE or HUD determines that an owner is not cooperative under § 401.402 or if an owner's request is rejected under § 401.403 or § 401.405. Any extension of the contract beyond 1 year for a pending Plan must be at comparable market rents or exception rents. An extension at comparable market rents or exception rents under this section will not affect a project's eligibility for the Mark-to-Market Program once it has been initially established under this part.

§ 401.601 Consideration of an owner's request to renew an expiring contract without a Restructuring Plan.

(a) *Applicability of part 402.* If HUD or the PAE determines that renewal at rents that do not exceed comparable market rents under § 402.4 of this chapter would be sufficient to maintain both adequate debt service coverage on the HUD-insured or HUD-held mortgage and necessary replacement reserves to ensure the long-term physical integrity of the project, the project-based assistance will be renewed under § 402.4 of this chapter (subject to § 402.7 of this chapter) without developing a Restructuring Plan.

(b) *When Restructuring Plan needed.* If HUD or the PAE determines that renewal at market comparable rents under § 402.4 of this chapter would not be sufficient to maintain adequate debt service coverage and reserves, HUD or

the PAE may require a Restructuring Plan before the owner's request will be given further consideration. If HUD or the PAE determines that the project's continued operation without a Restructuring Plan is not feasible and the owner does not cooperate in the development of an acceptable Restructuring Plan, HUD will pursue whatever administrative actions it considers necessary.

§ 401.602 Tenant protections if an expiring contract is not renewed.

(a) *Notice of non-renewal or rent increase.* (1) The owner of an eligible project who has requested a Restructuring Plan and later fails to extend or renew an expiring contract, except due to a rejection under § 401.101, § 401.403 or § 401.405, must provide a 12-month notice of contract non-renewal to tenants and HUD as provided in section 514(d) of MAHRA and a 90-day notice of any rent increase to tenants as provided in section 8(c)(8) of the United States Housing Act of 1937. HUD may prescribe the form of the notices. If the owner gives such 12-month notice, the owner is not required to give a separate 180-day notice of contract non-renewal under section 8(c)(9) of the United States Housing Act of 1937.

(2) The owner of an eligible project who has not requested a Restructuring Plan, or an owner who requested a Restructuring Plan but who has been rejected under § 401.101, § 401.403, or § 401.405, must provide 180-day notice of contract non-renewal to tenants and HUD under section 8(c)(9) of the United States Housing Act of 1937 and 90-day notice of any rent increase to tenants under section 8(c)(8) of that Act. If the owner gives such 180-day notice, the owner is not required to give a separate 12-month notice of non-renewal under section 514(d) of MAHRA.

(b) *If owner does not give notice.* If an owner described in paragraph (a)(1) or (a)(2) of this section does not give timely notice of non-renewal, the owner must permit the tenants in assisted units to remain in their units for the required notice period (either 12 months or 180 days, as applicable) with no increase in the tenant portion of their rent. This period will begin on the earlier of the date notice of non-re-

newal was given to the tenants and HUD or the date of expiration for the contract. If an owner described in paragraph (a) of this section does not give timely notice of any rent increase, the owner must permit the tenants in assisted units to remain in their units for 90 days with no increase in the tenant portion of their rent. This period will begin on the earlier of the date notice of any rent increase was given to the tenants or the date of expiration for the contract. The 90-day period will run concurrently with any applicable 12-month or 180-day period.

(c) *Availability of tenant-based assistance.* Subject to the availability of amounts provided in advance in appropriations, HUD will make tenant-based assistance available under the following circumstances:

(1) If the owner of an eligible project does not extend or renew the project-based assistance, any tenant residing in an assisted unit on the date of contract expiration will be eligible to receive assistance on the later of the date of expiration or the date the owner's obligations under paragraph (b) of this section expire; and

(2) If a request for a Restructuring Plan is rejected under § 401.101, § 401.403, or § 401.405, any tenant who is a low-income family or who resides in a project-based assisted unit on the date of Plan rejection will be eligible to receive assistance on the later of the date the Restructuring Plan is rejected, or the date the owner's obligation under paragraph (b)(2) of this section expires.

§ 401.605 Project-based assistance provisions.

The project-based assistance rents for a restructured project must be the restructured rents determined under the Restructuring Plan in accordance with §§ 401.410 or 401.411.

§ 401.606 Tenant-based assistance provisions.

If the Restructuring Plan provides for tenant-based assistance, each assisted family residing in a project-based assisted unit when the project-based assistance terminates must be offered tenant-based assistance under part 982. The rent levels provided in

515(c)(4) of MAHRA will apply except for families already receiving tenant-based assistance when the project-based assistance terminates.

§ 401.607 Contract term.

The term of the initial and subsequent contract renewals under this part, whether for project-based or tenant-based assistance, will be determined by the appropriate HUD official.

Subpart F—Owner Dispute of Rejection and Administrative Appeal

§ 401.645 How does the owner dispute a notice of rejection?

(a) *Notice of rejection.* HUD will notify the owner of the reasons for a rejection under §§ 401.101, 401.402, 401.403, 401.405 or 401.451. An owner will have 30 days from receipt of this notice to provide written objections or to cure the underlying basis for the objections. If the owner does not submit written objections or cure the underlying basis for the objections during that period, the decision will become a final determination under section 516(c) of MAHRA and is not subject to judicial review.

(b) *Final decision after objection; right to administrative review.* If an owner submits written objections or asserts that the underlying basis for the objections is cured, after consideration of the matter HUD will send the owner a final decision affirming, modifying, or reversing the rejection and setting forth the rationale for the final decision.

§ 401.650 When may the owner make an administrative appeal of a final decision under this subpart?

The owner has a right to make an administrative appeal of the following:

- (a) A final decision by HUD under § 401.645(b) (including a final decision under § 402.7 of this chapter);
- (b) A decision by HUD and the PAE to offer a proposed Restructuring Commitment that the owner does not execute; and
- (c) A decision by HUD to accelerate the second mortgage under § 401.461.

§ 401.651 Appeal procedures.

(a) *How to appeal.* An owner may submit a written appeal to HUD, within 10 days of receipt of written notice of the decision, contesting the decision and requesting a conference with HUD. At the conference, the owner may submit, in person, in writing, or through a representative, its reasons for appealing the decision. The HUD or PAE official who issued the decision under appeal may participate in the conference and submit in person, in writing, or through a representative, the basis for the decision.

(b) *Written decision.* Within 20 business days after the conference, or 20 business days after any agreed upon extension of time for submission of additional materials by or on behalf of the owner, HUD will advise the owner in writing of the decision to terminate, modify, or affirm the original decision.

(c) *Who is responsible for reviewing appeal?* HUD will designate an official to review any appeal, conduct the conference and issue the written decision. The official designated must be one who was neither involved in, nor reports to another involved in, making the decision being appealed.

§ 401.652 No judicial review.

The reviewing official's decision under § 401.651 is a final determination for purposes of section 516(c) of MAHRA and is not subject to judicial review.

PART 402—PROJECT-BASED SECTION 8 CONTRACT RENEWAL WITHOUT RESTRUCTURING (UNDER SECTION 524(a) OF MAHRA)

Sec.

- 402.1 What is the purpose of part 402?
- 402.2 Definitions.
- 402.3 Contract provisions.
- 402.4 Contract renewals under section 524(a)(1) of MAHRA.
- 402.5 Contract renewals under section 524(a)(2) of MAHRA.
- 402.6 What actions must an owner take to request section 8 contract renewal under this part?
- 402.7 Refusal to consider an owner's request for a section 8 contract renewal because of actions or omissions of owner or affiliate.